

ERNEST WILKINSON,
Appellant

v.

ACTING ABERDEEN AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Reversing Decision and
: Remanding Case
:
:
: Docket No. IBIA 97-154-A
:
:
: July 6, 1998

Appellant Ernest Wilkinson 1/ seeks review of a June 20, 1997, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), leasing trust property on the Fort Berthold Reservation in which Appellant owns an interest. For the reasons discussed below, the Board of Indian Appeals (Board) reverses the Area Director's decision and remands this matter to the Area Director.

On February 10, 1971, Appellant and his wife, Mollie, signed a standard BIA form entitled "Assignment of Income from Trust Property" (Assignment). The Assignment was given as security for a mortgage of their trust property to the Farmers Home Administration, now Farm Service Agency. 2/ The Assignment states in pertinent part: 3/

3. In consideration of a loan from the lender, I hereby assign to the lender as security for repayment of such loan, all in[come] from the following described trust land:

"All income from all Trust land owned by the Borrower and located on the Fort Berthold Reservation."

1/ The Opening Brief filed in this matter identifies the appellants as Ernest Wilkinson, Wilbur D. Wilkinson, Alva Rose Hall, Virginia Wilkinson, Virgil Wilkinson, and Charles Wilkinson. The Notice of Appeal, however, was filed only by Ernest Wilkinson. No timely notice of appeal was received from the remaining individuals identified in the Opening Brief. 43 C.F.R. § 4.332(a). Therefore, the Board finds that the only appellant in this matter is Ernest Wilkinson.

2/ The Board will refer to both the Farmers Home Administration and the Farm Service Agency as "FSA."

3/ Because of poor copying quality, some of the words in the copy of the Assignment contained in the administrative record are not legible. The Board obtained a blank copy of the assignment form and has used that form to determine the illegible words. Words provided from the blank form are shown in brackets.

4. I hereby appoint the authorized Bureau officer or his successor (hereafter called the "officer") having jurisdiction over [the] area in which the lender is operating as my attorney to pay upon demand of the lender any payment on my loan when not [made as] agreed upon, said payment to be made from income from the trust land described above, and I ratify all that the attorney [shall la]wfully do, or cause to be done, under this authority.

5. I hereby grant to the lender, full right, power, and authority in its own name or in my name, to demand, collect, [sue], or re[ceipt] for any income from such land and to apply all such income upon my indebtedness to the lender in accordance with the terms [of] the note or other evidence of the debt.

The rights, powers, and authority granted herein shall be exercised only if payments on my loan are not made as agreed upon, [or] if I otherwise default on the provisions of the loan agreement.

6. It is understood that in the case of my death, this assignment shall constitute a claim against trust funds, income, or tr[ust] property superior to that of my heirs.

7. This instrument shall not be effective unless approved by the officer having jurisdiction over the area in which the land [is] situated, but immediately upon approval, evidenced by said officer's signature below, this instrument shall be fully effect[ive] according to its terms. The officer shall be advised in writing of any action which the lender contemplates under this authori[ty,] at least 10 days prior to the exercise of the rights, powers, and authority conferred herein.

The Assignment was approved by the Superintendent in February 1971. The typed date of approval has been altered by hand, and is illegible. Appellant does not contend, however, that the Assignment was not properly approved.

Mollie died on September 11, 1991. Her trust estate was submitted to Administrative Law Judge Vernon J. Rausch for probate.

By letter dated January 8, 1992, FSA demanded that BIA make payment on Appellant's and Mollie's mortgage under the Assignment. The letter stated that FSA had "exhausted all other sources of collection with no success."

Apparently, BIA placed a hold in favor of FSA on funds in the Individual Indian Money (IIM) accounts for Appellant and for Mollie's estate. The administrative record does not disclose the date when this hold was placed on the accounts or the attendant circumstances. However, the holds were in effect before November 16, 1992, because, by letter of that date to the Superintendent, FSA agreed to "a one time release of funds [to the Wilkinson family] * * * from [Appellant's] or Mollie's IIM account."

By memorandum dated December 11, 1992, the Superintendent forwarded to Judge Rausch FSA's demand letter (apparently the January 8, 1992, letter); FSA's November 16, 1992, letter concerning the release of funds; and a December 10, 1992, letter from the individuals named in Mollie's will requesting the release of funds to a funeral home for Mollie's funeral and to Appellant for ranching operations. The memorandum asked Judge Rausch to consider the documents in Mollie's pending probate, and stated: "There are no other claims against the estate of the decedent other than the funeral claim and [FSA] claim on file at the Fort Berthold Agency."

On October 13, 1993, Judge Rausch determined that the persons entitled to take Mollie's trust interests were the persons named in her will, i.e., Appellant and Harry, Virginia, Charles D., and Virgil D. Wilkinson. In his Order, the Judge noted that, on December 14, 1992, he had authorized the release of funds from Mollie's IIM account to pay the funeral home and ranching expenses. The Judge did not mention or approve any claim against Mollie's estate from FSA.

By letter dated August 5, 1996, FSA again wrote to the Superintendent, seeking, among other things, assistance in collecting on Appellant's and Mollie's mortgage.

On February 19, 1997, the Superintendent issued notice of those trust lands on the Fort Berthold Reservation that were available for leasing. Included in that notice were four tracts which Appellant has identified as being tracts in which he owns an interest. The notice stated that sealed bids would be opened on March 19, 1997.

By letter dated March 13, 1997, the Superintendent wrote to Appellant, stating:

This is in reference to the tracts of lands owned by you and your deceased spouse, Mollie Wolf Wilkinson Estate and mortgaged to the [FSA].

Enclosed is a copy of a letter dated August 5, 1996 which we received from [FSA] which states they have not been receiving lease rentals to apply towards your mortgage.

The [FSA] has also filed a "Demand Letter" against you and your deceased spouse's [IIM] accounts.

This is to advise you and your family members that these lands will be advertised for leasing purposes at our lease sale on March 19, 1997 to the bidder offering the highest rentals.

* * * * *

If you or family members have any questions please contact [FSA].

Nothing in the administrative record shows when Appellant received the Superintendent's letter. However, Appellant contends that he had 2 days notice of the advertisement.

On March 18, 1997, Appellant wrote to the Superintendent, asking that the tracts be removed from the lease sale because they were being farmed by family members. The Superintendent responded on March 24, 1997:

We could not honor your request since [FSA] by letter informed this office they are not receiving any lease income to apply towards your mortgage and we have not been honoring their "Demand Letter."

The tracts were awarded to the highest bidder and leases will be issued to the following lessees:

* * * * *

Enclosed are copies of the demand letters dated April 25, 1985, January 15, 1986, January 21, 1987, and May 25, 1988 as requested in your letter. [4/]

The Superintendent again directed Appellant to contact FSA with any questions.

Appellant appealed to the Area Director, who issued the decision presently on appeal on June 20, 1997. The decision states:

[The Assignment] was executed by you and Mollie in order for guaranty payments to FSA [sic], in the event you were unable to do so.

Mollie Wilkinson's Estate remains open because the assignment constitutes a claim against trust funds, income, or trust property.

By notice of January 1 [sic, should be January 8], 1992, FSA invoked paragraph 4 of the assignment for payment of your delinquent account. By notice of August 5, 1996, FSA requested necessary steps be taken to ensure income from mortgaged property be made to them.

Since no substantial payments were being made to FSA to satisfy your debt, it was determined, in order to generate income, the lands were advertised for lease.

To avoid foreclosure of trust lands by FSA and to generate income for payment to FSA, we are upholding the decision of the * * * Superintendent to advertise the lands for lease.

Appellant appealed to the Board. Only Appellant filed a brief on appeal.

4/ Appellant contends that the Superintendent's letter did not include copies of these four demand letters. The administrative record submitted to the Board does not contain copies of the letters.

Appellant argues that BIA has no authority under 25 C.F.R. Part 162 to lease his land without his consent. Neither the Superintendent nor the Area Director indicated the authority under which BIA leased Appellant's land. However, any such authority must be found in 25 C.F.R. § 162.2(a), which provides:

The Secretary may grant leases on individually owned land on behalf of:
(1) Persons who are non compos mentis; (2) Orphaned minors; (3) The undetermined heirs of a decedent's estate; (4) The heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf.

Nothing in the record suggests that the circumstances described in 25 C.F.R. § 162.2(a)(1), (2), or (4) are present in this case. Therefore, BIA's authority must come from either subsection (a)(3) or (5).

The Area Director referred to Mollie's estate as still being open because of the FSA claim. For purposes of this discussion only, the Board assumes that this statement is correct. ^{5/} It is possible that BIA believed that because Mollie's estate was still open, it had authority to lease the lands under 25 C.F.R. § 162.2(a)(3). However, regardless of the status of the rest of Mollie's estate, her heirs were determined in Judge Rausch's October 13, 1993, order. The Board has previously held that BIA does not have authority to lease land under 25 C.F.R. § 162.2(a)(3) for "undetermined heirs" when those heirs have actually been determined, even though the estate remained open for other reasons. See Estate of Eugene R. Trust v. Acting Aberdeen Area Director, 11 IBIA 203, 206-07 (1983).

Alternatively, BIA may have construed the Assignment as "written authority to execute leases" on behalf of Appellant and/or Mollie under 25 C.F.R. § 162.2(a)(5). However, the Assignment authorizes BIA only to pay FSA from income from the trust property; it does not authorize BIA to lease that property in order to generate income.

^{5/} The Board does not have the probate record in Mollie's estate. Therefore, it does not know whether FSA properly filed a claim against her estate. Under 43 C.F.R. § 4.250(a), "[a]ll claims against the estate of a deceased Indian held by creditors chargeable with notice of the [probate] hearing * * * shall be filed with either the Superintendent or the administrative law judge prior to the conclusion of the first hearing, and if they are not so filed, they shall be forever barred." Despite the Superintendent's statement in his Dec. 11, 1992, memorandum to Judge Rausch that there was an FSA claim against Mollie's estate, the fact that the Judge did not rule on any such claim in his Oct. 13, 1993, Order suggests that no claim was properly filed. Although ¶ 6 of the Assignment gives FSA's claim priority over Mollie's heirs, it would not excuse FSA from filing a claim during probate of Mollie's trust estate. Based on the limited documents before it, the Board finds it at least questionable whether Mollie's estate should be considered "open" because of the FSA claim.

In the absence of any statement from the Area Director explaining the perceived source of BIA's authority to lease the tracts at issue here, the Board finds no such authority. It therefore reverses the decision to advertise and lease Appellant's trust interests in the four identified tracts.

Citing Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983), and 25 C.F.R. § 115.10, Appellant also objects to the holds placed on his and Mollie's IIM accounts. Although Appellant objected to the holds in his appeal to the Area Director, the Area Director did not address the issue in his decision.

The Board has previously held that when an issue is raised before BIA, but BIA fails to address it, the Board may remand that issue to BIA for an initial decision. See Walter Torske & Sons v. Acting Billings Area Director, 30 IBIA 157, 161 (1997); Redfield v. Billings Area Director, 13 IBIA 356, 360 (1985). Therefore the Board remands the question of the holds placed on Appellant's and Mollie's IIM accounts to the Area Director for appropriate consideration in accordance with the division of responsibilities between BIA and the Special Trustee for American Indians.

Appellant seeks money damages from BIA in the total amount of \$850,000. As the Board has consistently held, it is not a court of general jurisdiction, but rather has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA. See, e.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996), and cases cited therein. Therefore, this claim is dismissed for lack of jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Aberdeen Area Director's June 20, 1997, decision is reversed. This matter is remanded to the Area Director with instructions to take the necessary steps to effectuate this decision. The Board also remands the question of the holds placed on Appellant's and Mollie's IIM accounts. That part of Appellant's appeal which sought money damages against BIA is dismissed for lack of jurisdiction. 6/

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

6/ The Board considered all arguments not specifically addressed, and either rejected them or found discussion of them unnecessary to the resolution of this appeal.